IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-366

TIDEWATER OIL COMPANY, *Petitioner,*

v.

UNITED STATES OF AMERICA and PHILLIPS PETROLEUM COMPANY, *Respondents.*

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The brief of the United States in opposition does not controvert—indeed, appears to concede—that to permit interlocutory appeals in a government civil antitrust case under 28 U.S.C. § 1292(b) would be "an enormous service to this Court in lightening its burden" (p. 8). It argues, however, that this "would not

justify ignoring the limitation in the Expediting Act". That statement reverses the correct question, which is whether the Expediting Act, enacted in 1903, should be interpreted to read into the Interlocutory Appeals Act, enacted in 1958, a limitation which is not there but which is sought to be derived from the entirely different history of § 1292(a). That question deserves the attention of this Court.

Our petition called attention to *Farbenfabriken Bayer, A.G.* v. *United States,* 1968 Trade Cases ¶ 72,570 (C.A.D.C.) (Pet., p. 20). The brief in opposition informs us that certiorari was denied in that case in 1968. That is a fact to which the government had not called attention when it cited the case below, and there was no available means of tracing its history, as the case had not been officially reported. We submit that no significance should be given to denial of certiorari in the *Farbenfabriken* case, particularly in view of the way in which the matter came before this Court. There the District Court had denied a motion to dismiss a complaint for insufficient service of process under the Patent Code. Defendant made four simultaneous but different efforts to have this Court hear its cause. On the same day in October Term, 1968 (September 11, 1968), it filed a 19-page jurisdictional statement supporting an appeal directly from the District Court (No. 504), a 20-page motion for leave to file a petition for a common law writ of certiorari directly to the District Court (Misc. No. 838), an 11-page motion for leave to file a petition for a common law writ of certiorari to the Court of Appeals (Misc. 839), and a 9-page petition for a writ of certiorari to that court (No. 505). The greater part of this extensive material dealt with the merits of the motion in the District

Court; the appeal was dismissed and the motion and petitions denied on the same day (393 U.S. 216, 958, 959).

It is by the present petition that the basic question is squarely presented for the first time to this Court, unencumbered by extraneous considerations, and at a time when continuing history and the pressure of litigation on this Court emphasizes the importance of the question and the necessity that it be authoritatively resolved. The brief in opposition discloses (p. 6) that even now the issue is before the Seventh Circuit.

In a footnote (p. 1) the brief in opposition throws out a passing suggestion that "technically" a petition for certiorari under 28 U.S.C. § 1254(1) "appears inapplicable" on the theory that the "case was never in the Court of Appeals" because leave to appeal to that court was denied. Although the brief in opposition then dismisses the objection as of no moment, because this Court may issue a common law writ, we note that the objection lacks merit, even technical. While the case of *United States* v. *Phillips Petroleum Company and Tidewater Oil Company* may never have been in the Court of Appeals, the case of *Tidewater Oil Company* v. *United States of America and Phillips Petroleum Company,* No. Misc. 5791 in United States Court of Appeals for the 9th Circuit, *was* in that court. The petition for leave to appeal was a separate and independent proceeding filed in the Court of Appeals under 28 U.S.C. § 1292(b), and it is the disposition of that proceeding of which we seek review by the instant petition for certiorari.

All other arguments in the brief in opposition were anticipated and covered in our petition.

CONCLUSION

We respectfully submit that the petition should b granted.

DATED: October 19, 1971.

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